IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner
(Respondent-Appellee below),

against

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
Owner of SS. KOTOR,
Respondent
(Libellant-Appellant below).

BRIEF FOR PETITIONER

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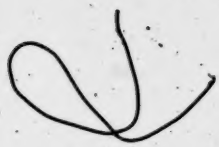

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BRIEF FOR PETITIONER

I

Reports of the Opinions Below

The opinion of the Circuit Court of Appeals (R. 27) is reported in 141 F. (2d) 652.

The opinion of the District Court (R. 8) is reported in 48 F. Supp. 402.

II

Jurisdiction of This Court

1. This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted October 9, 1944, not yet officially reported, as follows:

> "The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the first and second questions presented by the petition for the writ and case transferred to the summary docket" (R. 41).

2. The statutory provision believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C., §347(a).

3. By the writ of certiorari petitioner, respondent in an action in admiralty, seeks to review a final judgment of the Circuit Court of Appeals for the Fifth Circuit (R. 34), which denied petitioner's motion to dismiss an appeal to that court and reversed a final decree of the United States District Court for the Southern District of Georgia, Augusta Division, dismissing the libel of respondent herein (R. 16, 17).

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4. The order for mandate of the Circuit Court of Appeals sought to be reviewed was entered on April 5, 1944 (R. 34). The petition for writ of certiorari was filed in this Court on June 20, 1944 (R. 42).

5. The statute involved herein is of the Act of February 13, 1925, c. 229, §8[c], 43 Stat. 940; 28 U. S. C., §230, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals

for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

6. The petition urged as reason for granting the writ that

(a) This case involves an important procedural question involving appeals in admiralty which may be taken only upon compliance with the requirements prescribed by Congress in 28 U. S. C., §230.

(b) In holding that an appeal in admiralty is validly taken without any request to the court for an allowance of appeal within three months from the entry of the decree appealed from, the Circuit Court of Appeals has in effect nullified the statute and has decided an important question of procedure in direct conflict with *Alaska Packers Assn.* v. *Pillsbury*, 301 U. S. 174; *Barrel* v. *Transportation Co.*, 3 Wall. 424, and *McCrone* v. *United States*, 307 U. S. 61.

(c) The decision of the Circuit Court of Appeals is also in direct conflict with the decisions of the Circuit Courts of Appeals in the following cases: *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750, cert. den. 280 U. S. 584; *Camden Iron Works Co.* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846; *United States* v. *New National Coal & Mining Co.*, C. C. A. 7, 72 F. (2d) 168; *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61.

(d) The questions presented are of great importance to courts of admiralty and practitioners of admiralty law, and the decision of the Circuit Court of Appeals appears to be in conflict with an Act of Congress as construed by this Court, the weight of authority and established principles of admiralty procedure.

III

Statement of the Case

Respondent herein, owner of the Panamanian steamship *Kotor*, brought this action in personam in admiralty against petitioner, a Georgia corporation, to recover damages for alleged breach of a contract for shipment by petitioner of a part cargo of pine timbers at Jacksonville, Florida, for carriage by respondent to Alexandria, Egypt (R. 2, 3). Although petitioner shipped the entire quantity and paid the full ocean freight at the measurement rate stated in the contract (R. 10, 15), respondent carrier, claiming that the timbers exceeded a guaranteed weight of four pounds per board foot, brought this action to recover an additional sum of $9,304 for "lost freights on a corresponding amount of tonnage" (R. 3).

The action was tried June 24, 1942 before Hon. Archibald B. Lovett, United States District Judge (R. 1, 16), who filed an opinion on December 5, 1942 (R. 8-13) and findings of fact and conclusions of law on April 20, 1943 (R. 13-16), holding that libellant (respondent herein) failed to sustain its burden of proving that petitioner's shipment in fact exceeded four pounds per board foot when loaded on the ship at Jacksonville, and accordingly dismissed the libel on the merits (R. 11, 13, 16).

The final decree of the District Court dismissing the libel was entered April 20, 1943 (R. 1, 16, 30), from which date respondent herein had three months in which to appeal under the provisions of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; U. S. Code, Tit. 28, §230, supra, p. 2.

On July 12, 1943 respondent filed in the office of the Clerk of the District Court a notice of appeal to the Circuit Court of Appeals for the Fifth Circuit, served on petitioner's counsel July 6 (R. 1, 17, 30). On July 12 respondent's counsel also consulted with District Judge Lovett concerning the amount for which an appeal bond for costs should be furnished, which he fixed at $250 (R. 30). Respondent made no request for an allowance of appeal or

other action by the Court or Judge during the three months' period which expired July 20, 1943 (R. 24, 30). The appeal bond was not filed until July 21, at which time respondent also filed assignment of errors (R. 1, 2, 19, 22, 30).

On August 12, 1943 respondent's counsel presented a petition for allowance of appeal to the District Judge, who allowed it on August 13, 1943 (R. 19, 24, 30). On August 30, 1943, the District Judge signed an order allowing the appeal nunc pro tunc as of July 12, 1943, in which he recited that the record contained no allowance of appeal prior to the order of allowance based on the petition therefor filed August 12, 1943, which, however, was subsequent to the expiration of the "ninety day period" (sic) following the date of the final decree; that the Judge, during the "said ninety day period" learned of appellant's intention to appeal and "undoubtedly would have allowed the appeal if and when so requested" (R. 2, 24-25).

Petitioner herein moved the Circuit Court of Appeals for the Fifth Circuit to dismiss the appeal on the ground that application therefor was not duly made within three months after the entry of the decree appealed from, as required by the statute (R. 30, 35).

On March 1, 1944 the Circuit Court of Appeals for the Fifth Circuit heard argument on the motion to dismiss the appeal and on the merits (R. 27). On April 5, 1944 it rendered an opinion (R. 27, 30-33) and judgment (R. 34) denying the motion to dismiss the appeal and reversing the decree of the District Court on the merits, with instructions to remand for further and not inconsistent proceedings. On June 20, 1944 the petition for a writ of certiorari herein was filed (R. 42).

The following is a summary of the occurrences below in connection with respondent's purported appeal:

1943

Apr. 20 Final decree dismissing libel entered (R. 1, 16, 30).

July 6 Notice of appeal served on petitioner's proctors (R. 30).

July 12 Notice of appeal filed with Clerk of District Court (R. 1, 17). No application for allowance of appeal or order allowing appeal.

July 12 Proctors for respondent consulted the District Judge on the amount of an appeal bond, fixed at $250 (R. 30).

July 16 Appeal bond executed (R. 30).

July 20 Period for application for allowance of appeal expired (three months from April 20).

July 21 Appeal bond and assignment of errors filed with Clerk of District Court (R. 1, 2, 18, 22, 30).

Aug. 6 Petition for allowance of appeal prepared (R. 30).

Aug. 12 Petition for allowance of appeal filed (R. 24, 30).

Aug. 13 Appeal allowed (19, 30).

Aug. 14 Praecipe filed (R. 2).

Aug. 17 Citation dated August 16 issued (R. 2, 25, 26)

Aug. 30 Order of the District Judge signed and filed, allowing appeal nunc pro tunc as of July 12 (R. 2, 24-25, 30).

IV

Opinion of the Circuit Court of Appeals

In connection with the procedural question now before this Court for review the Circuit Court of Appeals held:

(a) "The point as to our jurisdiction is quite a serious one." As the Federal Rules of Civil Procedure, by the express terms of Rule 81(a)(1) do not apply in admiralty, appellate jurisdiction in admiralty depends upon "substantial reliance" on 28 U. S. C. A., §230 (R. 30).

(b) Appellant (respondent herein) "did not within the ninety days" (sic) from the entry of the decree "formally apply for and obtain the allowance of an appeal" (R. 30). Nevertheless, if informal application is timely made, actual allowance may come later (R. 32).

(c) Respondent's acts in merely filing a notice of appeal and inquiring of the District Judge concerning the amount of a prospective bond for costs (subsequently executed) "amounted to a timely application to appeal" (R. 33).

(d) Indicating considerable doubt and hesitancy that its decision squared with this Court's opinion in *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, the court said:

> "It is quite plan [plain] that it was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the Alaska case, which, though not directly in point, is disturbing, we should not hesitate to hold: that what appellant did amounted to a timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established" (R. 33).

(e) Notwithstanding that respondent failed to request any action by any court or judge for allowance of appeal, approval of an appeal bond, or otherwise, during the statutory period, nevertheless *R. F. C.* v. *Prudence Group*, 311 U. S. 579, and other cases "warrant our taking jurisdiction and denying the motion to dismiss" because otherwise would be "to deprive a litigant of his right to appeal merely because, though it plainly appeared that he was intending to and thought he was doing what was necessary to, appeal, he took his steps informally instead of formally" (R. 32).

V

Specification of Errors

The decision of the Circuit Court of Appeals is erroneous:

I. In holding that, although the Act of February 13, 1925, 28 U. S. C., §230, governs appeals in admiralty, mere "substantial reliance" upon its provisions is sufficient.

2. In holding that the statutory requirements are met if a litigant intends to appeal and takes such steps as he thinks are requisite.

3. In holding that an appeal from a final decree in admiralty may be taken merely by filing a notice of appeal and communicating to the District Judge an intention to appeal, without request for any action by the court to allow the appeal during the three months' period.

4. In holding that the Circuit Court of Appeals has jurisdiction of an appeal from a final decree in admiralty, allowed by the District Court upon application made more than three months after entry of the decree.

5. In failing to hold that an appeal from a final decree in admiralty is not validly taken unless the appellant, within three months from the entry of the decree, applies to the District Court for its present action allowing the appeal.

VI

Questions Presented

The first and second questions presented by the petition for the writ and now before this Court are as follows:

1. May an appeal from a final decree in admiralty be taken without making an application for allowance thereof within three months from the entry of the decree appealed from?

2. Does the mere filing of a notice of appeal in admiralty and an inquiry of the District Judge concerning the amount for which a bond for appeal costs should be issued, but without request for allowance of appeal or for any action by the Judge within three months from the entry of the decree, constitute a "duly made" application for "allowance" of an appeal in admiralty?

POINT I

The Circuit Court of Appeals erroneously held that an appeal from a final decree in admiralty may be taken without application for allowance thereof within three months from the entry of the decree appealed from, as required by the Act of February 13, 1925, 28 U. S. C., §230.

Prior to September 16, 1938 all appeals in actions at law, in equity and in admiralty were governed by Section 8[c] of the Act of February 13, 1925, c. 229, 43 Stat. 940, 28 U. S. C., §230, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

By the Act of June 19, 1934, c. 651, §1, 48 Stat. 1064, 28 U. S. C. 723(b), this Court was granted the power to prescribe by general rules, the forms, practice and procedure in civil actions at law. Rule 1 provides that the Rules shall govern the procedure in the District Courts in actions at law and equity, except as stated in Rule 81. Rule 81(a)(1) provides:

> "These rules do not apply to proceedings in admiralty."

Congress has not altered the controlling statute, nor has this Court altered the admiralty rules so as to permit an appeal in admiralty to be taken by merely filing a notice of appeal, as permitted in actions at law and equity by Rule 73 of the Federal Rules of Civil Procedure. The provisions of 28 U. S. C., §230, continue to govern the requirements for taking an appeal in admiralty. *The Fanny D.*, C. C. A. 5, 112 F. (2d) 347, 349, cert. den. 311 U. S. 680; *Blaske* v. *Dick*, C. C. A. 7, 126 F. (2d) 96. In

deed, the court below stated that the Federal Rules of Civil Procedure do not apply in admiralty (R. 30), although in effect it disposed of the case as if they did.

The Act of February 13, 1925, U. S. C., §230, has the same application to decrees in admiralty that it had to decrees in equity and judgments at law prior to the Federal Rules of Civil Procedure. *Alaska Packers Assn.* v. *Pillsbury*, 1937, 301 U. S. 174, 177. Accordingly it is clear that the authorities construing the statute before the promulgation of the Federal Rules of Civil Procedure remain applicable to its construction in respect of appeals in admiralty.

That the Federal Rules of Civil Procedure may not be extended by implication beyond the scope of their explicit terms in respect of statutory appeals is established by *McCrone* v. *United States*, 1939, 307 U. S. 61, where this Court dismissed an appeal in a civil action for failure to apply for its allowance under 28 U. S. C. A., §230, notwithstanding that the Federal Rules of Civil Procedure, dispensing with the requirement of application for allowance, became effective only three weeks after the time for the appeal expired. *A fortiori* the Rules do not apply to appeals in admiralty, which they expressly exclude.

It is accordingly clear that appeals in admiralty continue to be governed by the requirements of 28 U. S. C., §230, and the authorities which have construed it.

It is not open to question that the right to appeal in admiralty, as was the right to appeal in civil actions prior to the Federal Rules of Civil Procedure, is conditioned upon compliance with the express statutory requirements, and that acts falling short of such compliance do not confer jurisdiction upon the Circuit Court of Appeals. *Alaska Packers Assn.* v. *Pillsbury*, supra, established unequivocally that an appeal in admiralty is not validly taken unless its allowance by the court or judge is duly applied for within three months from the entry of the decree, and that even a rule of the Circuit Court of Appeals cannot dispense

with this requirement. Pointing out that even before the creation of the Circuit Court of Appeals the authorized procedure for taking an appeal from a decree in admiralty was by making application to the court rendering the decree, or to a judge or justice, and obtaining an allowance of an appeal, as held in *Barrel* v. *Transportation Co.*, 3 Wall. 424, this Court in the *Pillsbury* case said:

> "The reasons for requiring that an appeal be duly applied for and allowed are that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made. The reasons for thus conditioning the right of appeal have the same application to decrees in admiralty that they have to decrees in equity and judgments at law; and the act of 1925 includes one as much as another, for it says: 'No • • • appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made' • • • In the one circuit a rule exists whereby appeals in admiralty are excepted. But that rule contravenes the statute and has no force, for the power of a court to make rules necessarily is confined to such as are consistent with controlling laws" (p. 177).

In *McCrone* v. *United States*, supra, this Court, citing *Alaska Packers Assn.* v. *Pillsbury*, held that an appeal from a civil judgment under 28 U. S. C., §230, prior to the effective date of the Federal Rules of Civil Procedure, was invalid because taken only by filing a notice of appeal

and obtaining the trial judge's signature to a bill of exceptions, saying:

> "The controlling statute required application for allowance of a civil appeal within three months after judgment from which appeal was sought" (p. 65).

The requirements of the statute, 28 U. S. C., §230, are "mandatory and jurisdictional", and cannot be avoided by consent, waiver or even order of the court: *Robertson* v. *Morgantown Full Fashioned Hosiery Co.*, C. C. A. 4, 95 F. (2d) 780; *Osborn* v. *United States*, C. C. A. 4, 50 F. (2d) 712; *Morrow* v. *Wood*, C. C. A. 5, 126 F. (2d) 1021; *Vaughan* v. *American Insurance Co.*, C. C. A. 5, 15 F. (2d) 526; *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750, cert. den. 280 U. S. 584; *Robie* v. *Hart, Schaffner & Marx*, C. C. A. 8, 40 F. (2d) 871; *Collins* v. *United States*, C. C. A. 8, 24 F. (2d) 823.

The "application" which the statute requires to be "duly made" is a submission of the appeal to the court or judge, during the three months' period, for its immediate and present action allowing the same. *Alaska Packers Assn.* v. *Pillsbury*, supra; *McCrone* v. *United States*, C. C. A. 9, 100 F. (2d) 322, aff'd 307 U. S. 61; *United States* v. *New National Coal & Mining Co.*, C. C. A. 7, 72 F. (2d) 168; *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669; *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61; *Camden Iron Works* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846.

If the acts performed by the litigant within the prescribed period do not comply with the statutory requirements, even a nunc pro tunc order of the court is of no avail. *Old Nick Williams* v. *United States*, 215 U. S. 541; *Credit Co.* v. *Arkansas Central Ry.*, 128 U. S. 258; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61.

In the case at bar it is perfectly clear that no application for allowance of its appeal was made by respondent herein before the expiration of the three months' period on July 20, 1943. This failure is established beyond doubt (1) by the recital in the District Judge's nunc pro tunc

order of August 30, 1943, that the Judge learned of respondent's intention to appeal during the period, had not indicated any intention to disallow the same, and "undoubtedly would have allowed the appeal *if and when* requested" (R. 24); (2) by resopndent's actually submitting a petition for allowance of appeal on August 12, 1943, allowed by the District Judge the next day—more than three weeks after the three months' period had expired (R. 18-19, 24); (3) by respondent's ultimate reliance upon a mere inquiry of the District Judge concerning the amount of a bond for costs on appeal (R. 32), which, however, was not obtained until afterward, or submitted to the court's approval at all, or filed until July 21, three months and a day after the final decree was entered (R. 1, 22).

It follows that the court below did not acquire jurisdiction of the attempted appeal, and should have granted the motion to dismiss.

POINT II

The mere filing of a notice of appeal in admiralty and an inquiry of the District Judge concerning the amount for which a bond for appeal costs should be issued, but without request for allowance of appeal or for any action by the Judge within three months from the entry of the decree, did not constitute a "duly made" application for "allowance" of an appeal in admiralty required by the statute.

Though prefacing its opinion with the statement that "jurisdiction in admiralty depends upon substantial reliance upon 28 U. S. C. Sec. 230" (R. 31), the court below in effect ignored the statutory requirement of due application for allowance of the appeal within the three months period. Indeed, the court did not hold that respondent made a timely application for allowance of its appeal, but based its decision on the ground that what respondent did "amounted to a timely application to appeal" (R. 33).

What respondent did within the three months' period, however, was (1) merely file a notice of appeal in the office of the District Court clerk, and (2) ask the District Judge the amount of a bond for costs on appeal.

The filing of a notice of appeal does not constitute application for allowance of appeal. *Barrel* v. *Transportation Co.*, 3 Wall. 424; *Alaska Packers Assn.* v. *Pillsbury*, supra; *McCrone* v. *United States*, supra.

The "application" for allowance of appeal, required by the statute, necessarily carries the element of request. *Osborn* v. *United States*, C. C. A. 4, 50 F. (2d) 712, 714; *Robie* v. *Hart, Schaffner & Marx*, C. C. A. 8, 40 F. (2d) 871, 872; *Von Holt* v. *Carter*, supra.

The interpretation which the Circuit Court of Appeals for the Ninth Circuit, where the case arose, placed upon the decision of this Court in the *Alaska* case, is found in Rule 1 of its amended Rules in Admiralty:

> "Appeals in admiralty shall be taken by filing with the clerk of the trial court a petition for appeal, and obtaining an allowance thereof, within the statutory time."

It is manifest that respondent's mere inquiry of the District Judge as to the amount of a bond for costs on appeal was not an application to him for any present action allowing an appeal. No bond was presented for approval. Indeed, the bond was not obtained until later, and was not filed until the day after the three months' period had expired (R. 1, 2, 19, 22). Within the period nothing was presented to the Judge for his examination and action either to allow or disallow the appeal.

Respondent's inquiry of the District Judge concerning the amount for which an appeal cost bond should be obtained was at most merely an indication of its intention to appeal, without request for its allowance, and, as shown by the Judge's subsequent nunc pro tunc order of August 30, 1943 (R. 24), it was so understood by him. It was of no greater significance than a notice of appeal, and did not fulfill the requirements of the statute.

In *McCrone* v. *United States*, 1939, 307 U. S. 61, petitioner filed a notice of appeal and lodged with the clerk a proposed bill of exceptions which was settled and allowed by the District Court within three months from entry of the judgment. The Circuit Court of Appeals dismissed the appeal because timely application had not been made for its allowance as required by 28 U. S. C., §230, 100 F. (2d) 322, saying:

> "There was nothing equivalent to the application for and allowance of an appeal" (p. 324).

Affirming the dismissal, this Court said:

> "A notice of appeal was filed and a bill of exceptions signed. But petitioner's appeal was not, as appeals from civil judgments were required to be, applied for or allowed by the trial judge or a judge of the Court of Appeals. 28 U. S. C. §230; Alaska Packers Assn. v. Pillsbury, 301 U. S. 174" (p. 62).
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> "The controlling statute required application for allowance of a civil appeal within three months after judgment from which appeal was sought" (p. 65).
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> * * * * * *
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> "The Court of Appeals was not in error in dismissing petitioner's appeal for failure to comply with the statutory requirements governing civil appeals" (p. 65).

In *United States* v. *New National Coal & Mining Co.*, C. C. A. 7, 72 F. (2d) 168, the court said:

> "Appeal is granted to a losing party on condition that he complies with the terms of the law whereby it is authorized. * * * Merely declaring that he will appeal does not of itself amount to taking an appeal; nor does the mere filing of a petition for appeal have that effect. The filing of the petition for appeal avails nothing unless within the statutory time allowed for taking the appeal it is brought to the attention of the judge *for action thereon*" (p. 168).

In *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669, counsel for appellant, within three months, served and filed a notice of appeal and, in conference with the District Judge, presented to him an application for an allowance of the appeal but did not leave the papers with the Judge. In dismissing the appeal the court said:

> "It is clear that for some reason the petition for appeal, accompanied by the assignment of errors, was not finally submitted to the trial judge *for action at that time;* nor is there any suggestion that counsel seeking the appeal, at the time of the Duluth interview, had done all that he was required to do in order to have the appeal allowed, and that the delay was due solely to inaction by the court" (p. 670).

In *Camden Iron Works* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846, counsel, within the statutory time, withdrew his appeal papers from the clerk's office and brought them to the attention of the District Judge in connection with efforts to settle the bill of exceptions. Dismissing the appeal, the court said:

> "But we are not satisfied that application was then and there made for an *immediate or present allowance* of writ of error * * *" (p. 849).
>
> "We thus think that plaintiff in error has failed to show with requisite clearness that it did all within its power to procure the issuing of the writ within the statutory period" (p. 850).

The duty to apply for an allowance of appeal rests upon the appellant, not upon the clerk of the court. *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61; *Greyerbiehl* v. *Hughes Electric Co.*, C. C. A. 8, 294 Fed. 802, 804, cert. den. 264 U. S. 589; *Kentucky Coal Co.* v. *Howes*, C. C. A. 6, 153 Fed. 163.

In holding that respondent's acts in merely filing a notice of appeal and asking the District Judge the amount of a bond for costs on appeal, to be obtained subsequently, "amounted to" the making of due application for allow-

ance of appeal; the court below has construed the controlling statute, 28 U. S. C., §230, contrary to its express terms and has in effect nullified it. The fallacy of the reasoning by which it arrived at its conclusion will be shown in our next point.

POINT III

The court below erroneously held that respondent's attempted appeal was valid because respondent intended to appeal and thought it was taking the steps necessary to do so.

Misinterpreting the controlling statute by the statement that "jurisdiction in admiralty depends upon substantial reliance upon 28 U. S. C. Sec. 230" (R. 31) the court below proceeded to avoid its requirements by holding in effect that an appeal in admiralty may be taken without timely application for its allowance. The court based its decision, not upon any finding that such an application was made, but upon the theory that because respondent intended to appeal and thought it was taking the requisite steps, it would be "a travesty upon justice" to hold that its procedure was insufficient to accomplish its purpose (R. 32). Although the court did not say that the statute did not apply, it indirectly achieved the same result by holding that respondent took its steps "informally" (R. 32). This, however, is merely a figure of speech because respondent did not in fact apply to the court or judge for allowance of appeal, either formally or informally, within the three months' period. All it did was to bring to the judge's attention an intention to take an appeal, which as we have shown in Point II, supra, is entirely insufficient.

The court below evidently considered that the requirements of the statute are a mere formality which can be ignored by an intention to take an appeal, accompanied by acts which a litigant thinks are sufficient. The court's reasoning is clearly apparent from its language, as follows:

> "We agree with appellant. It is quite plain that it was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the *Alaska* case, which, though not directly in point, is disturbing; we should not hesitate to hold: that what appellant did amounted to timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established. It is quite clear that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve. We think that *R. F. C.* v. *Prudence Corp.* and the other cases cited above warrant our taking jurisdiction and denying the motion to dismiss" (R. 32, 33).

In other words, the court adopted the theory that appellate jurisdiction in admiralty does not depend upon compliance with the requirements prescribed by Congress, but is governed by the procedures which a litigant thinks are sufficient to accomplish his purpose. It would seem that the mere expression of this doctrine carries its own refutation.

By its admission that "the language of the opinion in the *Alaska* case * * * is disturbing" (R. 32-33), the court below gave clear evidence of its doubt that its decision squared with this Court's construction of the statute. Its attempt to avoid the *Alaska* decision by the statement that it is "not directly in point" (R. 32) is not supported by the showing of any ground for distinction.

Its holding that, because respondent "was endeavoring to appeal" and "the judge and everyone else thought it was effectively appealing",* its procedure should have "the legal effect it was designed to achieve" (R. 33) is clearly

* "Everyone else concerned" cannot include petitioner's counsel who merely received such papers as respondent's counsel chose to serve (R. 17, 22-30).

erroneous. Its fallacy is shown in *Alaska Packers' Assn.* v. *Pillsbury*, supra, where this Court said:

> "While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made" (p. 177).

If a litigant's belief in the correctness of his own procedure sets the standard of appellate jurisdiction, then Congress loses control over statutory courts and *Alaska Packers Assn.* v. *Pillsbury*, *McCrone* v. *United States*, and the other cited cases dismissing appeals for failure to comply with the statutory requirements have been wrongly decided. Indeed, in the *Alaska* case both the appellant and the Circuit Court of Appeals "thought" he was "effectively appealing" because he complied with a long-standing rule of that court dispensing with application for allowance of appeals in admiralty.

Statutory requirements for taking an appeal are not a mere formality which can be dispensed with, as the court below apparently considered. *United States* v. *Curry*, 6 How. 106, 113; *Saltmarsh* v. *Tuthill*, 12 How. 387, and authorities cited supra, p.

In *Matton Steamboat Co.* v. *Murphy*, 1943, 319 U. S. 412, this Court held that no jurisdiction was acquired under 28 U. S. C. §350, governing appeals to this Court in language substantially identical with 28 U. S. C. §230, where application was made to this Court after application to a judge of the state court had been made and denied, and the three months' period had expired. Stating that appellate procedure is controlled by Congress, not by litigants, this Court dismissed the appeal because not applied for in time. There, too, appellant "thought" he was "effectively appealing".

Unfamiliarity with the statutory requirement of application for allowance of appeal does not excuse a litigant from the result of non-compliance. *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750, 751; cert. den. 280 U. S. 584.

The error into which the court below fell was to extend a tolerance of informal procedure so as to dispense entirely with performance of an act which Congress has prescribed as essential to appeal. Liberality may not be carried so far. *McCrone* v. *United States*, C. C. A. 9, 100 F. (2d) 322, 324, aff'd 307 U. S. 61.

Admiralty proceedings cover a multiplicity of relationships and frequently involve numerous parties both direct and by impleader under the 56th Rule in Admiralty, and also by cross-libel, intervention and as claimants in proceedings for limitation of liability. There are cogent reasons for retaining the statutory requirement of timely application for allowance of an appeal in admiralty, so that, as this Court held in *Alaska Packers Assn.* v. *Pillsbury*, supra,

> "* * * there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. In this way improvident and unauthorized appeals are prevented" (p. 177).

If the requirement of application for allowance of an appeal in admiralty is no longer desirable, then Congress, and Congress alone, should make the change. Congress has not seen fit to alter 28 U. S. C. §230 in respect of appeals in admiralty, and "the power of a court to make rules necessarily is confined to such as are consistent with controlling laws", *Alaska Packers Assn.* v. *Pillsbury*, supra. The statute should not be nullified by characterizing the application of its requirements as "a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty on justice" (R. 32).

In relying upon *R. F. C.* v. *Prudence Group*, 1941, 311 U. S. 579, as warranting its taking jurisdiction and denying the motion to dismiss the appeal (R. 33), the court below apparently considered that this Court has established a

general rule that a statutory requirement for allowance of an appeal may be disregarded, overlooking the exceptional circumstances of that case. There the Circuit Court of Appeals for the Second Circuit, where the case arose, had held in *London* v. *O'Dougherty*, 102 F. (2d) 524, that appeals from certain compensation orders in bankruptcy cases could be taken as a matter of right. In reliance upon the permanency of that decision, the appellants filed notices of appeal from compensation orders without making application to the Circuit Court of Appeals for leave to appeal. Thereafter this Court, in *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, held that appeals from such orders may be had only at the discretion of the Circuit Court of Appeals. Misled by the decision of their own court in *London* v. *O'Dougherty*, the appellants were thus caught in a trap. This Court held that in view of the circumstances and the diligence of appellants in following the then established procedure, "it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London* v. *O'Dougherty*, supra" (p. 583). But this Court carefully pointed out that:

> "The proper procedure for taking them [appeals] is by filing in the Circuit Court of Appeals, within the time prescribed in § 25(a), applications for leave to appeal, not by filing notices of appeal in the District Court as was done here" (p. 581).
>
> "Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient" (p. 582).

Concurring, Mr. Justice Reed, Mr. Justice Roberts joining with him, said:

> "Timely application to the circuit court of appeals for leave to appeal is a jurisdictional requirement, and • • • the practice followed in this case cannot be reduced to a mere procedural irregularity. • • • How-

ever, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London* v. *O'Dougherty*, 102 F. (2d) 524. In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires" (p. 583).

In the case at bar, no exceptional circumstances whatever were present, and respondent was not misled by any unsettled practice or conflict of authority. *Alaska Packers Assn.* v. *Pillsbury* stood as a clear and final pronouncement that 28 U. S. C. §230 means what it says and that appeals from final decrees in admiralty are invalid unless application is duly made to the court for allowance of appeal within three months from the entry of the decree. The record is barren of any justification for respondent's failure to make such application to the District Judge who was available and whose nunc pro tunc order of August 30, 1943, shows he was not requested to allow an appeal (R. 24). The practice in the Second Circuit, where proctors for respondent principally practice (R. 24), is definitely established, not only by *Alaska Packers Assn.* v. *Pillsbury*, but by Rule XXXVIII of the Rules of the Circuit Court of Appeals for the Second Circuit which provides in respect of appeals in admiralty:

"* * * An allowance of the appeal shall be obtained and filed with the notice."

LAST POINT

Both questions presented to this Court should be answered in the negative. The decree of the Circuit Court of Appeals should be reversed with directions to dismiss the attempted appeal to that court for lack of jurisdiction and to reinstate the final decree of the District Court.

Respectfully submitted,

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Dated, New York, December, 1944.

(Emphasis throughout is supplied.)